meeting, it might be months before civil suit No. 457 of 1961 was determined and it was most undesirable and against the interest of the members of the company to wait indefinitely before an annual general meeting could be held and that in view of the dispute and pending the determination of the civil suit it would be impossible for the company to convene or conduct a meeting in the usual or in a proper manner and he therefore asked that the Court should exercise its power under sub-section (2) of section 116 and order a meeting of the company to be called to discuss:

(a) who should be directors of the company; and

(b) whether the land bought by the members of the company from Mrs. Brown should be transferred to trustees.

Sub-section (2) of section 116 reads as follows:—

"If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in manner prescribed by the articles or this Ordinance, the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit....."

The only decision on the corresponding provision in the English Companies Act, 1948, is *In re El Sombrero Ltd.* (1) where Wynn-Parry J. says —

"It is to be observed that the section opens with the words 'If for any reason' and therefore it follows that the section is intended to have, and, indeed, has by reason of its language, a necessarily wide scope. The next words are '..... it is impracticable to call a meeting of a company.....'. The question then arises, what is the scope of the word 'impracticable'? It is conceded that the word 'impracticable' is not synonymous with the word 'impossible'; and it appears to me that the question necessarily raised by the introduction of that word 'impracticable' is merely this: examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting can be conducted, there being no doubt, of course, that it can be convened and held."

There the company concerned had three members, namely the applicant with 900 shares and the respondents each with 50 shares. The respondents were already directors when the applicant acquired his shares, and had remained as directors. No general meeting of the company including the first annual general meeting, had ever been held and no annual return had been filed. The company's articles provided that the quorum at general meetings of the company should be two members present in person or by proxy and that, if within half an hour from the time appointed for a meeting the quorum should not be present, the meeting, if convened on the requisition of members, should be dissolved. Wynn-Parry J. held that in these circumstances it was impracticable to hold a meeting of the company, as the two directors could always see and always saw to it that there was no quorum for any meeting and he accordingly granted the application, directing that one member of the company present in person or by proxy should be deemed to constitute a quorum.

In my judgment, in a matter such as the one before me it is not enough for the applicant to satisfy me that it is impracticable to call or conduct a meeting; he must further satisfy me that it is impracticable to call a meeting of the company *in any manner in which meetings of that company may be called,* or to conduct the meeting of the company *in manner prescribed by the articles or the Ordinance.* In the case cited the applicant satisfied the Court that while it was possible to convene and hold a meeting it would be impracticable to conduct it in manner prescribed by the articles or the Act, as the other two members of the company always ensured the lack of a quorum.

But here I do not think that the applicant could have satisfied the learned Senior Assistant Registrar, from whose decision this appeal is, and has not satisfied me that the articles or the Ordinance make it impracticable to call or conduct a meeting of the company. The pending civil suit No. 457 of 1961, which made it uncertain who were and who were not directors of the company, did make it impracticable to call or conduct a meeting of the company, but that suit is no longer pending, having been determined on the 20th August, 1962. In these circumstances I feel obliged to dismiss this application. Accordingly this appeal by the company is allowed.

As regards costs, I said when delivering judgment in civil suit No. 457 of 1961 that I shall consider the costs in these two matters together. Having considered the representations of the parties, I am of the opinion that in that civil suit there shall be no order regarding costs, it being my view that the assets of this company are better preserved for the benefit of its unfortunate members rather than be squandered away in litigation and that in this summons the applicant shall pay the respondent's costs.

Application dismissed.

Solicitors: *P. T. Wong & Co.; T. K. Sen & Co.*

LOW KAR YIT & ORS. v. MOHAMED ISA & ANOR.

[O.C.J. (Gill J.) February 23, 1963]

[K.L. — Civil Suit No. 547 of 1961]

Contract — Sale of land — Option to purchase piece of land — Option subject to "formal contract to be drawn up" — Exercise of option by plaintiffs — Refusal to complete by defendants — Whether there was binding agreement — Specific performance — Contracts (Malay States) Ordinance, 1950, s.7.

Land Laws — Sale of land — Subject to "formal contract to be drawn up" — Option — Exercise of — Defendant refusing to complete — Specific performance.

The defendants gave an option to the agent of the plaintiffs to buy a piece of land subject to (a) a formal contract to be drawn up and agreed upon by the parties and (b) the approval of the sale and of the said contract by the High Court at Kuala Lumpur. The plaintiffs' agent duly exercised the option and on the defendant's

failing to sign the agreement of sale, the plaintiffs instituted the present proceedings for specific performance or damages for breach of contract.

Held: (1) on the construction of the document sued upon, the option was conditional upon and subject to a formal contract to be drawn up and agreed upon between the parties, so that the exercise of the option amounted to nothing more than an agreement to enter into an agreement;

(2) accordingly, there was no concluded contract between the parties.

Cases referred to:—

(1) *Govind Luxman Gokhale* v. *Harichand Mancharam* A.I.R. 1919 Bom. 40.
(2) *Rossiter* v. *Miller* (1878) 3 App. Cas. 1124 at p. 1132.
(3) *Chinnock* v. *Marchioness of Ely* 4 D.J. & S. 638; 46 E.R. 1066.
(4) *Harichand Mancharam* v. *Govind Luxman Gokhale* 50 I.A. 25.
(5) *Whymper & Co.* v. *Buckle & Co.* I.L.R. (1881) 3 All. 469; 2 Indian Decisions (1881-82) Allahabad 319.
(6) *Winn* v. *Bull* (1877) 7 Ch. D. 29.
(7) *Von Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284.
(8) *Coope* v. *Ridout* [1920] 2 Ch. 411.
(9) *Coope* v. *Ridout* [1921] 1 Ch. 291.
(10) *Rossdale* v. *Denny* [1921] 1 Ch. 57.
(11) *Chillingworth* v. *Esche* [1924] 1 Ch. 97.
(12) *Lockett* v. *Norman Wright* [1925] 1 Ch. 56.
(13) *Raingold* v. *Bromley* [1931] 2 Ch. 307.
(14) *H.C. Berry Ltd.* v. *Brighton and Sussex Building Society* [1939] 3 All E.R. 217.
(15) *Spottiswoode, Ballentyne & Co.* v. *Doreen Appliances Ltd.* [1942] 2 K.B. 33.
(16) *Eccles* v. *Bryant and Pollock* [1948] 1 Ch. 93.
(17) *George Trollone* v. *Martyin Bros.* [1934] 2 K.B. 436.
(18) *Hutton* v. *Watling* [1948] 1 Ch. 398.
(19) *Alexander Brogden and Others* v. *The Directors &c. of the Metropolitan Railway Company* (1876) 2 App. Cas. 666.

ACTION.

R. Ramani (*Ng Ek Teong* with him) for the plaintiffs.

Chung Shiu Tett for the defendants.

Gill J.: In this case the plaintiffs claim specific performance or alternatively damages for breach of an agreement alleged to have been entered into by them with the defendants for the sale of a piece of land. To be precise, their claim is for an order requiring the defendants as administrators of an estate to execute an agreement for the sale by them to the plaintiffs of a piece of land belonging to the estate and to apply to the High Court for approval of such agreement of sale, in accordance with the terms of an option dated the 20th January, 1961 granted by the defendants to one Mohamed Yusuff who as agent for the plaintiffs duly exercised the said option by serving through his solicitors on the defendants a letter dated the 21st January, 1961.

The facts of the case are not in dispute and the evidence in the case is purely documentary. By a writing dated the 20th January, 1961 the defendants as administrators of the estate of Jamiah binti Abdul Rahman gave an option to one Mohamed Yusuff bin Mahyuddin to sell the land held under E.M.R. No. 6246 for Lot No. 4739 in the Mukim of Batu in the District of Kuala Lumpur comprising an area of 10 acres 1 rood 10 poles belonging to the estate of the said deceased for the sum of $206,250 at the rate of $20,000 per acre. It was stipulated that the option was to be exercised by giving notice in writing to the defendants or either one of them, such notice to reach on or before the 31st January, 1961 at 5.00 p.m. It was further provided that if the option was exercised in the manner stipulated it shall be subject to:—

" (a) a formal contract to be drawn up and agreed upon by yourself and ourselves;

(b) the approval of the sale and of the said contract by the High Court at Kuala Lumpur."

The option was duly exercised by Mohamed Yusuff through his solicitors by serving on the defendants a letter dated the 21st January, 1961. Following the exercise of the option, discussions took place between the plaintiffs' solicitors and the defendants' solicitors with reference to the agreement to be signed by the parties. A final agreement as reached between the solicitors of both parties was prepared by the defendants' solicitors who by their letter dated the 7th February, 1961 sent six copies of the agreement to the plaintiffs' solicitors for execution by the plaintiffs. The plaintiffs' solicitors by their letter dated the 10th February, 1961 returned the six copies of the agreement duly executed by their clients to the defendants' solicitors for execution by the defendants and asked for the return of five copies after they had been signed by the defendants and stamped. The plaintiffs' solicitors stated in their letter that the sum of $20,937, being the deposit, had been deposited with them and would be handed over to the defendants' solicitors upon receipt of five copies of the agreement duly signed by their clients. The plaintiffs' solicitors later received a letter dated 28th March, 1961 from the defendants' solicitors to say that defendant No. 2 had refused to execute the said document. The plaintiffs commenced these proceedings on 10th September, 1961.

The sole question to be determined in this case is whether there was in fact a concluded agreement between the parties as alleged by the plaintiffs. Mr. Ramani on behalf of the plaintiffs conceded at the very commencement of his submissions that the law applicable in this case is not essentially different from the English law of Contract and that the legal position is governed by section 7 of our Contracts (Malay States) Ordinance, 1950 which reads:—

" 7. In order to convert a proposal into a promise the acceptance must —

(a) be absolute and unqualified;

(b) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a

reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance."

Thus the case turns on the elementary principles of offer and acceptance. It is plain that a contract comes into existence where there has been an unqualified acceptance of a definite and unequivocal offer, the corollary of which is that there can be no binding contract either if a conditional offer is followed by an unqualified acceptance or if an unqualified offer is followed by a conditional acceptance; in either of these two cases no legally binding contract will arise unless and until the stipulated condition is fulfilled. In other words, where a condition is attached to an offer, an unqualified acceptance of that offer must result in a similar situation as will arise on a qualified acceptance of a definite offer. I mention this because in some of the decided cases to which I shall refer in the course of my judgment there was a definite offer followed by a conditional acceptance, but, as I have stated, in my judgment the legal position is the same whether the condition is attached to the offer or to the acceptance.

The offer in this case was contained in the option granted by the defendants to Mohamed Yusuff. Mr. Ramani's contention on behalf of the plaintiffs is that the option coupled with the letter of 21st January, 1961, whereby notice of exercise of the option was given, constituted a concluded agreement between the parties. His argument is that an offer is to be distinguished from an option and in support of this argument he quoted the following passage from *Salmond and Williams on Contracts* (2nd Edition), section 46, page 133:

"The consideration given by the option-holder deprives the grantor not merely of the right to revoke the option lawfully, but of his power to revoke it effectively. Notwithstanding any such wrongful revocation, the option may be exercised, and the conditional contract already constituted by the grant of the option will become *ipso jure* an absolute contract by the fulfilment of the condition."

Mr. Ramani's contention would be correct if there had been no condition stipulated in the option itself as regards a formal contract to be drawn up and agreed upon by the parties. Indeed if this were to be the only contention relied upon by Mr. Ramani the matter could be disposed of on a preliminary question as to whether the condition as to the drawing up of a formal contract goes to the root of the matter, but Mr. Ramani is not resting his case solely on this ground.

Mr. Ramani's second argument, which he has put forward with great force and persuasiveness, is that where the essential elements of the agreement, such as the parties to the agreement, the thing to be sold and the price to be paid, can be gathered from the documents which passed between the parties in the course of their negotiations for the sale and purchase of land, such documents will not the less constitute an agreement in the full sense between the parties merely because it is within the contemplation of the parties that there shall be a subsequent and formal contract. The leading Indian case which Mr. Ramani cited in support of this argument is the case of *Govind Luxman Gokhale* v. *Harichand Mancharam* [1]. As the decision in this case was based on the general rule of construction as laid down by the House of Lords in *Rossiter* v. *Miller* [2], it would be more convenient to refer to that case first.

The appeal to the House of Lords in *Rossiter* v. *Miller* arose out of an action for specific performance brought by the vendor of certain property against the purchaser. The main question in the case was whether there was in point of fact a concluded contract between the parties. The facts of the case were as follows. An estate was offered for sale in lots shown upon a plan on which various conditions were printed. After the conditions came the following clause:

"Each purchaser will be required to sign a contract embodying the foregoing conditions and providing for the payment of a deposit at the rate of 10% on the amount of the purchase money, and for the completion of the purchase at the expiration of not exceeding two months from the date of the contract."

Miller made a verbal offer to White, the agent of the owners, to purchase certain lots for £1,000. White informed him that he must purchase subject to conditions, and promised to lay his offer before the proprietors. Shortly afterwards White wrote to Miller saying that the proprietors accepted Miller's offer to purchase the specified lots for £1,000, subject to conditions on the plan, and that he had requested the solicitors to forward to Miller the agreement for purchase. Miller replied by letter that his offer had better be re-considered unless he was left at liberty to build or not as he pleased. White replied by letter that the acceptance by the proprietors was not conditional and that Miller would be at liberty to build or not. The contract was sent to Miller but he refused to sign it or to proceed with the purchase. On those facts the Master of the Rolls held at the trial of the action that there was a contract. On appeal to the Court of Appeal it was held that on the true construction of the documents the signing of a formal contract was a condition precedent to the parties being bound. Baggallay L.J. said in the course of his judgment:

"The case comes within the principle laid down by Lord Westbury in *Chinnock* v. *Marchioness of Ely* [3], that if an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

On further appeal to the House of Lords it was held that what had taken place by the correspondence constituted a complete contract between the parties and that under such circumstances the execution of a formal deed was not necessary. The Lord Chancellor (Lord Cairns) said:

"I pause there for the purpose of pointing out to your Lordships that in these conditions there are to be

found the terms — and the detailed terms — of a contract, such as might reasonably be expected to be proposed with regard to sales of plots of land of this description. There is no doubt a stipulation that the purchaser would be required to sign a contract embodying these conditions. That is an obvious and natural term, because the contemplation is that persons will come in and will make offers of the price which is required for the plots, and at that point the persons so offering will not be bound by anything; it will be necessary to bind them, and therefore they are told, beforehand, that at the time when their offer is accepted, or along with the acceptance of it, the matter will not be allowed to rest *in dubio*, or without legal obligation, but that they will be required to sign something which will bind them. But they are also told what they will be required to sign; it will not be a contract at the arbitrium of the vendors, not a contract the terms of which they do not know, not a contract the provisions of which they will see for the first time when it is offered to them to sign, but a contract as to which the vendors are content, beforehand, to bind and oblige themselves that it will assume the shape of these stipulations, and no other shape. That is what is stated to the purchasers by this printed form of conditions.

... ...

My Lords, I have only to say that — but that I have found the learned Judges in the Court of Appeal, for whose opinion I have the greatest respect, taking a different view — I should have said that a clearer and simpler case of an offer made and accepted by a correspondence consisting of no more than three letters I have seldom seen. Every term is made clear, by reference to an elaborate scheme of conditions under which the sales were to be made. The offer is recognised in terms by the person who had made it, under his hand, and it is accepted without the possibility of doubt or cavil by the persons to whom the offer was made.

My Lords, the reference to the agreement in the first letter is, I think, exactly what you might have expected to find. I have pointed out that at that time the purchaser was in no way bound, and therefore it was right in the vendors to call upon him for the signature of the agreement which he was bound to sign. But, as regards any legal consequence, the moment he himself had written a letter in which he had referred to the contract as a contract under the terms and conditions of the articles of 1871, the vendors might, if they had so desired it, have required the agreement to be prepared and signed as a matter of form, but as a matter of law it was to my mind perfectly indifferent whether they did so or not. If they did so, if an agreement had to be prepared and signed, it must be an agreement exactly to the effect of the terms and conditions of the paper of 1871, and no other terms and conditions could have been introduced. If other terms and conditions had been introduced, either party would have had a perfect right not only to refuse to accept those other terms, but to insist upon an agreement in the original terms of the paper of 1871.

... ...

My Lords, I can only say that I am willing to accept every word of Lord Westbury as there given. I assume that the construction put by him upon the letter I have quoted was a proper construction, and I entirely acquiesce in what he says, that if you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract. But, I repeat, it appears to me that in the present case there is nothing of that kind; there is a clear offer and a clear acceptance. There is no condition whatever suspending the operation of that acceptance until a contract of a more formal kind has been made."

Lord Hatherley said:

"It has been established for far too long a time, and by some precedents in your Lordships' House, that if you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, we will have this agreement put into due form by a solicitor. ..... Both parties may desire that it shall be put into a formal shape by a solicitor who, in that case, will not be able to vary the agreement either on one side or the other, but only to put into a more formal and professional shape the agreement which had been completely formed with unity of purpose with reference to the sale and purchase by the two parties to the contract."

Lord Blackburn said:

"So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, shew that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed.

Parties often do enter into a negotiation meaning that, when they have (or think they have) come to one's mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think that the parties ought not to be held bound till they have executed the formal agreement. ..... I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up."

Lord Gordon said:

"I think that the correspondence founded on, constituted a completed contract for the purchase and sale of the lots in question, at the price stipulated, and on the conditions specified in the conditions and stipulations printed on the plan. No doubt these conditions provided for a subsequent and formal deed being executed by the parties; but that deed was only for the purpose of more formally setting forth the conditions upon which the parties had agreed. If there was anything introduced into the proposed deed, which the purchaser considered beyond the terms and conditions on which he purchased the property, he would have been entitled to object, and, if necessary, the proper terms of the deed could have been adjusted at the sight of a Court of Law. But in my view *the contract* between the parties was concluded by the correspondence and the conditions which were referred to and embodied in it."

In the case of *Govind Luxman Gokhale* v. *Harichand Mancharam, supra,* on which Mr. Ramani relies, the facts were as follows. On 28th November, 1917 the plaintiff and defendant drew up and signed two writings in Gujerati, which to all intents and purposes were identical in terms. They contained the names of the

parties, the description of the property to be sold, the price to be paid, a provision regarding the division of the costs of the conveyance, etc., the conditions that the seller must make out a marketable title, and that the vendor must get the signature of a certain adopted son on the sale deed, a provision that the seller has not to pay brokerage and the time for completion. Finally each party wrote: "I have given and taken from you the agreement to the above effect of my own free will and pleasure." One of the conditions of the sale was that the bargain paper in respect of the sale of the said immovable property shall be made through a vakil within two days from the date of the documents. After these documents were executed, a draft agreement in English was prepared but the parties could not agree to the terms of the draft. Eventually on 8th December, 1917 the defendant's solicitors wrote that as the plaintiff did not agree to the terms of the draft agreement as altered by them there was no course left open to the defendant but to break off the negotiation for the sale of the property: that the Gujerati chitti was not the agreement which the parties intended to enter into for the sale of the property, as their clients understood that the altered agreement for sale and all the necessary terms and conditions of such sale would be entered into at the office of the vakil as provided in the said chitti. On those facts Marten J. the trial judge on the original side of the Court, came to the conclusion that the condition that the "bargain paper" in respect of the sale shall be made by a vakil within two days from the date of the agreement was a condition to which the whole bargain was subject, so that until the vakil prepared the bargain paper there was no completed contract. He accordingly dismissed the plaintiff's suit with costs.

On appeal by the plaintiff to the High Court in its appellate jurisdiction MacLeod C.J. and Heaton J. held that the two documents constituted a binding agreement and that the provision relating to the preparation of the bargain paper by a vakil was not a condition to which the contract was subject. MacLeod C.J. in the course of his judgment laid stress on the general rule of construction as laid down by the House of Lords in *Rossiter* v. *Miller, supra,* and went on to say in reference to that case as follows:

> "The facts of that case more nearly approach the facts of this case than the facts of any of the other cases which have been cited to us. There were conditions of sale which were considered to be the terms upon which the lots were offered for sale. It was provided that each purchaser was to sign a contract embodying the conditions and providing for the payment of a deposit. But the facts of this case are very much stronger, as the alleged contract is to be found not in correspondence between the parties but in a document which is in the form of a regular agreement."

This decision was upheld by the Privy Council: see *Harichand Mancharam* v. *Govind Luxman Gokhale* [4].

Perhaps I should refer in passing to one more Indian case to which Mr. Ramani referred. It is the case of *Whymper & Co.* v. *Buckle & Co.* [5] in which it was held that where two parties have come to a final agreement, the mere fact that at the time of their doing so they intend to embody the terms of such agreement in a formal document does not make such agreement less binding on them. Mr. Ramani referred to a few other cases, but as these other cases are also relied on by the defendants I propose to deal with them when I come to the defendants' case.

The case for the defendants is that the exercise of the option was subject to a formal contract to be drawn up and agreed upon by Mohamed Yusuff and the defendants, and that as neither the draft nor the alleged final agreement, prior to its execution by the plaintiffs, was ever referred to or approved by the second defendant, and the defendants not having executed the formal contract, there was no concluded contract between the plaintiffs and the defendants. Mr. Chung's contention on behalf of the defendants is that the option in this case does not need a great deal of interpretation to show what it means. It was not an unconditional option as appears from its last paragraph.

The authorities in support of Mr. Chung's contention are legion, but I propose to refer in detail only to some of them. In *Winn* v. *Bull* [6], by a written agreement the plaintiff agreed to let and the defendant agreed to take on lease a house for a certain term at a certain rent "subject to the preparation and approval of a formal contract". No formal or other contract was entered into between the parties. It was held that there was no final agreement of which specific performance could be enforced against the defendant. Jessel M.R. said:

> "When, therefore, you see a stipulation as to a formal agreement put into a contract, you may say it was not put in for nothing, but to protect the vendor against that very thing.
>
> ... ...
>
> It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail."

In *Von Hatzfeldt-Wildenburg* v. *Alexander* [7] an alleged contract for the sale of a leasehold house was contained in letters wherein it was stipulated by the purchaser that her acceptance was subject to, amongst others, a condition that

her solicitors should "approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract". It was held that on the construction of the documents there was no complete contract susceptible of being enforced by way of specific performance. The conclusion of Parker J. was that this case was within the principle of *Winn* v. *Bull, supra,* and numerous other similar cases, and that the letters did not constitute a binding contract. His Lordship summed up the result of the authorities in the following words:

> " It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire."

The decisions in *Winn* v. *Bull, supra,* and *Von Hatzfeldt-Wildenburg* v. *Alexander, supra,* were followed in the case of *Coope* v. *Ridout* [8]. In this case the purchasers made an offer to a vendor to purchase his freehold property at a specified sum "subject to title and contract." The purchasers alleged that all the material terms were subsequently agreed between the parties at an interview and by letters, and were embodied by the purchasers in a draft contract which the vendor returned unaltered with the words: "It seems to be all in order." The vendor having refused to complete, the purchasers brought an action for specific performance of the contract contained in the draft. It was held that, even assuming that all the terms of the agreement had been settled one by one and embodied in the draft, the condition contained in the offer required that a written contract made inter partes should be formally entered into, and in the absence of such a document there was no enforceable contract. Eve J. said:

> " That brings me to the question of what is the true meaning of the condition. Is it fulfilled as soon as you can assert with confidence that the parties are *ad idem* and that a consensus on all material points has been reached? I do not think so. I think the condition contemplates and requires a written contract made inter partes and formally entered into. In my opinion, that document has never come into existence in this case, and, in the absence of it, I cannot think I ought to hold that the defendant is bound. On these grounds, therefore, I come to the conclusion that there is no enforceable contract, and that the action must be dismissed with costs."

The decision of Eve J. was affirmed by the Court of Appeal: see *Coope* v. *Ridout* [9].

In *Rossdale* v. *Denny* [10] also the offer itself was made subject to a formal contract. The facts of the case were as follows. The plaintiff wrote to the defendant's agent, with whom he had been negotiating for the purchase of leasehold property belonging to the defendant, as follows: "I hereby beg to offer 75,000L. for the property. . . . . I am prepared to pay 7,500L. deposit on signing of formal contract, completion to take place fourteen days after you are in a position to give vacant possession. This offer is subject to a formal contract to embody such reasonable provisions as my solicitors may approve, and to the lease containing no unusual provisions or covenants." On the same day the defendant's agent wrote to the plaintiff: "In reply to your letter of even date, I am instructed to accept on behalf of my client . . . . the offer therein contained, and I will communicate with him at once so that he may instruct his solicitors to prepare formal contract." No formal contract having been executed, the defendant repudiated the agreement. In an action by the plaintiffs for specific performance of the alleged contract it was held that the offer was conditional upon a formal contract being executed and that there was no binding contract between the parties. Russell J. said:

> " Numerous authorities exist upon this question, and a careful selection of them has been produced to me by both sides. The result of them may, I think, be fairly stated in this way: they are unanimous in this, that the question is one entirely depending upon the true construction of the documents. If upon the true construction of the documents the reference to a formal contract amounts to an expression of a desire on the part of one or other of the parties, or both, that their already complete contract should be reduced into a more formal shape, then the fact that no such contract has been executed is no defence to the action, but the original and complete contract survives and may be enforced. If, on the other hand, the true construction of the documents is this, that either the offer or the acceptance was conditional only, then the non-execution of a formal contract affords a defence to the action upon the ground that the parties really did not intend to be bound until a formal document had in fact been executed."

The decision of Russell J. was affirmed by the Court of Appeal.

In *Chillingworth* v. *Esche* [11], by a document of July 10, 1922, the purchasers agreed to purchase certain freehold land and a nursery from the vendor "subject to a proper contract to be prepared by the vendor's solicitors" and acknowledged having paid 240L. "as deposit and in part payment of the said purchase money." Completion was fixed for November 2. The purchasers signed the document and the vendor added and signed a receipt for the deposit confirming the sale. A proper contract was subsequently prepared by the vendor's solicitors,

approved by the purchasers' solicitor, executed by the vendor, and tendered to the purchasers for execution. The purchasers, however, refused to sign it, declined to proceed with the transaction, and claimed the return of the deposit. It was held by the Court of Appeal, reversing the decision of Astbury J. that the document of July 10, 1922, was only conditional and did not constitute a firm contract and that the purchasers were in the circumstances entitled to recover the deposit. Warrington L.J. said:

"The important words in that document are 'subject to a proper contract to be prepared by the vendor's solicitors.' It has been held over and over again that where you have a document relating to the sale and purchase of land framed in these terms, the object of inserting those words is to avoid binding the parties unless and until the contract referred to has been prepared and signed by both parties."

Sargant L.J. said:

"To my mind the words 'subject to contract' or 'subject to formal contract' have by this time acquired a definite ascertained legal meaning — not quite so definite a meaning perhaps as such expressions as f.o.b. or c.i.f. in mercantile transactions, but approaching that degree of definiteness. The phrase is a perfectly familiar one in the mouths of estate agents and other persons accustomed to deal with land; and I can quite understand a solicitor saying to a client about to negotiate for the sale of his land: 'Be sure that to protect yourself you introduce into any preliminary contract you may think of making the words 'subject to contract'. I do not say that the phrase makes the contract containing it necessarily and whatever the context a conditional contract. But they are words appropriate for introducing a condition, and it would require a very strong and exceptional case for this clear *prima facie* meaning to be displaced."

In *Lockett* v. *Norman Wright* [12] it was held that the expression "subject to suitable agreements being arranged between your solicitors and mine" was a condition precedent to any concluded bargain and did not make the solicitors agents to conclude the bargain: and accordingly that there was no absolute contract between the parties that the plaintiff could enforce. Tomlin J. said:

"The plaintiff urges that the phrase here means: 'I agree to take a lease at the rent and for the term mentioned in the letter and upon such other terms as the solicitors of the parties may settle between themselves'; and that when once the draft lease had been approved by the solicitors the condition was fulfilled and there was an absolute contract.

I do not think I can place any such construction upon the language. I think the natural meaning of the language is that the execution of a suitable agreement or suitable agreements in a form approved by the solicitors on both sides is a condition of any concluded bargain."

In *Raingold* v. *Bromley* [13] the defendant employed house agents to let shop premises. The plaintiff, after inspecting the premises, offered to take a lease. In reply the house agents wrote to him on the same day: "Referring to our conversation this morning on the telephone, we confirm that, subject to the terms of a lease, our client is prepared to accept your offer to take the above premises on a 7, 14, or 21 years' lease at a rent of 350L. per annum for the first 14 years, rising to 375L. for the last 7 years..... We have instructed Mr. Bromley's solicitors to put the draft lease in hand immediately to forward to your solicitors . . ." The draft lease was forwarded on the same day, and after negotiations as to its terms the defendant's solicitors wrote to the plaintiff's solicitors: "We have now received our client's instructions on the draft lease, and he is prepared to accept your client's alterations. We are, therefore, having the lease engrossed, and will forward you a counterpart for execution by your client in due course." This was done, but the defendant then refused to execute the lease, and granted a lease of the premises to some one else. The plaintiff commenced proceedings for specific performance, or (alternatively) damages. It was held that there was no binding contract to grant a lease as the expression "subject to the terms of the lease" meant "subject to the terms to be contained in a lease executed by the lessor". Lawrence L.J. said:

"It is plain that an agreement to grant a lease the terms of which are to be the subject-matter of a future negotiation and agreement between the parties is not a concluded agreement to grant a lease. It has been argued, however, by Mr. Gover and Mr. Danckwerts that such an agreement amounts to a concluded agreement to grant a lease conditional upon the parties agreeing the term of the lease, and when the parties or their solicitors have reached an agreement as to the terms to be included in the proposed lease the original agreement to grant the lease is absolute. In my opinion this argument is fallacious. An agreement to grant a lease which is conditional on an agreement being reached as to the terms to be contained in it is not an enforceable agreement. The subject-matter of the suggested agreement is the granting of a lease, and if the terms of the lease are not agreed but are left to future negotiation and agreement, the original agreement amounts to nothing more than an agreement to enter into a contract at some future time. It is not as if the alleged agreement in the present case were an agreement defining all the essential terms of the lease subject only to the approval by the solicitors of the form of the lease; in such a case it might be held that there was a concluded agreement leaving merely the terms of it to be reduced into proper form by the solicitors. Even on the plaintiff's construction the agreement is one which leaves all the terms of the lease to be subsequently negotiated, and is therefore too vague to be enforceable. The matter, however, does not rest there, for in my opinion the true construction of the expression 'subject to the terms of a lease' is that contended for on behalf of the defendant. The expression, I think, means 'subject to the terms to be contained in a lease executed by the lessor', and therefore implies that a lease has to come into existence and has to be executed by the lessor before any binding agreement is reached. The expression 'subject to the terms of a lease' is in my opinion at least as strong as 'subject to contract', and was inserted in the letter of December 9 in order to keep the matter open until a lease had actually been executed by the defendant. If this be so, no concluded bargain would be reached until the lease had been executed by the defendant, even although the negotiations as to the terms to be contained

in the lease had been brought to a conclusion by agreement between the solicitors of the parties."

Raingold v. *Bromley, supra,* was followed in *H.C. Berry Ltd.* v. *Brighton and Sussex Building Society* (14) in which an offer to take a three years lease of premises was accepted on behalf of the landlord, subject *inter alia,* "to a lease to be drawn up by our clients' solicitors". It was held that the agreement amounted to nothing more than an agreement to enter into a contract at some future time, and was, therefore, void. Both these cases were cited with approval in the Court of Appeal (reversing the decision of Atkinson J.) by Lord Greene M.R. in *Spottiswoode, Ballentyne & Co.* v. *Doreen Appliances Ltd.* (15) in which it was held that the true meaning of the words "subject to the terms of a formal contract to be prepared" was that no contract was to exist between the parties unless and until a formal agreement had been entered into.

In *Eccles* v. *Bryant and Pollock* (16) the Court of Appeal went a step further by holding that "where parties enter into an agreement for the sale of real property 'subject to contract', the contract, in the absence of express agreement to the contrary, is not complete until the parties have exchanged their copies in accordance with ordinary conveyancing practice, and until such exchange is effected either party can withdraw." Lord Greene M.R. in the course of his judgment quoted the following dictum of Maugham L.J. in *George Trollone* v. *Martyin Bros.*:— (17)

> " Ever since the case of *Winn* v. *Bull,* if not long before, it has been well settled that the result of an offer 'subject to contract,' means that the matter remains in negotiation until a formal contract is executed, that is, if the contract is recorded in two parts, until the formal contracts are exchanged."

In the light of the principles enunciated in the above cases in such unmistakable language, which it will be presumptuous on my part even to attempt to paraphrase and summarize, I am compelled to say that I cannot see how it can conceivably be argued that there ever arose a legally binding contract between the parties to this action. The doctrine of *Rossiter* v. *Miller* clearly does not cover the circumstances of this case. That was a case in which everything essential to the completion of the contract appeared on the written documents — the parties, the premises, the conditions or terms, and the price. An offer was made; those who had full power to accept it did accept it, in terms by their fully authorized agent. At one stage the purchaser thought that they were making a fresh condition; they answered that they were not, and again accepted it, simply and absolutely, as he had asked them to do. It could not be said, therefore, that anything remained but to carry out the bargain which was then and thus consummated. In any event the bargain in that case was not made subject to a formal contract to be drawn up and agreed upon, as in this case. The case of *Govind Luxman Gokhale* v. *Harichand Mancharam, supra,* is equally inapplicable to this case because the facts in that case were even more strongly in favour of a concluded agreement than the facts in *Rossiter* v. *Miller, supra.*

I agree with Mr. Ramani's contention that the first thing to do in this case is to construe the documents sued upon. In this connection he has cited the case of *Hutton* v. *Watling* (18) in which Lord Greene M.R. said:

> " The true construction of a document means no more than that the court puts upon it the true meaning, being the meaning which the other party, to whom the document was handed or who is relying upon it, would put upon it as an ordinary intelligent person construing the words in a proper way in the light of the relevant circumstances."

On the application of that test it seems to me that there is one construction and one construction only which can be placed on the document on which the plaintiffs have based their claim. The option on the face of it was clearly conditional upon and subject to "a formal contract to be drawn up and agreed upon" between the parties, so that the exercise of the option amounted to nothing more than an agreement to enter into an agreement which, of course. has no legal effect. In my judgment that is the true construction to be placed on the documents relied upon by the plaintiffs in this case.

That the execution of a subsequent document in the nature of a formal contract, possibly containing such terms as were not included in the option, was within the contemplation of the parties is clearly demonstrated by the fact that upon the exercise of the option the solicitors of the parties proceeded to draw up a formal contract. Indeed a formal contract was drawn up and signed by the plaintiffs although it was not signed by the defendants. There is overwhelming authority for the proposition that this subsequent agreement could not be said to have been agreed upon until it was executed by the defendants by subscribing their signatures to it.

It has to be remembered that the option in this case was for the proposed sale of immovable property belonging to an estate of which the defendants were the administrators. They knew or must be presumed to have known that they would have to seek leave of the court to sell any immovable property to the estate. It would be reasonable to suppose that it was their intention to enter into a formal contract with the prospective purchasers and then to bring it before the

court for approval. I am not saying that they could not have made an application to the court for approval of the sale without a proper written contract, but what I do say is that their intention to agree upon a formal contract is manifestly clear from the option itself which speaks of "the approval of the sale and of the said contract by the High Court".

The authorities would appear to support the view that even where there is nothing in the agreement to suggest that the parties contemplate that the subsequent contract shall contain any new or different terms, nevertheless if it appears that the parties do not intend to bind themselves contractually by the agreement but only by the subsequent contract if and when they should enter into it, there will be no contract. Moreover, if the reference to the execution of the subsequent contract is in words which according to their natural construction import a condition, this will almost invariably be conclusive that the agreement itself was not intended to be a contract. To my mind this was true of this case. It will bear repetition if I say that when the actual phrase "subject to contract" is used, the courts tend to give effect to those words unless there is strong evidence to the contrary. The result is that the agreement which is made "subject to contract" is of no legal effect. Perhaps I should add that the plaintiffs in this case are asking the court to order the defendants to execute the draft agreement agreed upon, which amounts in effect to asking the court to enforce an agreement to enter into an agreement. That is an order which the court clearly has no power to make in the circumstances of the case.

Mr. Ramani cited the case of *Alexander Brogden and Others* v. *The Directors &c. of the Metropolitan Railway Company* (19) as an authority for the proposition that circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either and that in such a case the word "approved" written by one of the parties at the end of the draft agreement must be taken as an approval of the substance of the draft. The short answer to that is that there is no evidence in this case that the defendants wrote the word "approved" at the end of the draft agreement. There is also no evidence that the defendants constituted their solicitors as agents for the purpose of signing the draft agreement finally agreed upon. Moreover, subsequent authorities indicate quite clearly that formal execution by the party to be charged is necessary.

Lord Greene M.R. in the case of *Eccles* v. *Bryant and Pollock, supra,* in the opening passage of his judgment said:

> "This case is one of that long series of cases which no doubt will go on as long as contracts take place, in which one party to a transaction, which was intended to produce a contract and was carried on on the usual condition that it was to be subject to contract, is attempting to say that a contract came into existence at a date on which the other party says that negotiations had not yet been completed and that no binding contract had come into existence at all."

Those prophetic words of the learned Lord Master of the Rolls are equally true of this case. The conclusion to be drawn here, therefore, is the same as in that case, namely, that there is no completed contract on which the plaintiffs can sue for specific performance or damages.

In the result I have reluctantly come to the conclusion that there was no concluded contract between the parties to this action. I say "reluctantly" because of the conduct of the defendants in breaking off the negotiations when the terms of the proposed agreement were agreed upon and in capriciously refusing to sign the agreement. However, in the words of Tomlin J. in *Lockett* v. *Norman Wright, supra,* "it is no part of my duty to pronounce whether or not the conduct of any of the parties concerned in this matter is open to censure. All I have to do is to determine whether there is or is not a concluded contract between the plaintiffs and the defendants which the plaintiffs can enforce". Accordingly, the action is dismissed with costs.

Action dismissed.

Solicitors: *Braddell & Ramani; Chung & Huang.*

DEVRAJ NAHAR & ORS. v. GIAN SINGH & CO.

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) February 28, 1963]

[K.L. — F.M. Civil Appeal No. 48 of 1962]

Landlord and Tenant — Sub-tenant entering into partnership with two other persons — Partnership carrying on business in same premises — Provision in partnership agreement allowing partner to retire at end of two years — Whether agreement constitutes an assignment.

Control of Rent Ordinance, 1956 — Permitted increases in rent without determining sub-tenancy — Assent of sub-tenant — Whether valid — Object of s.6(2).

The 1st appellant was the sub-tenant of the respondents of premises at which he was carrying on business in partnership with two other persons. Clause 2 of the partnership agreement provided that any partner might retire at the end of two years from the date of the execution of the agreement. The respondents instituted ejection proceedings on the ground that by virtue of the